No. 04-11

Supreme Court, U.S.
FILED
JUL 29 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

PACIFIC PROPERTIES AND DEVELOPMENT CORPORATION,

Petitioner,

v.

DISABLED RIGHTS ACTION COMMITTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

RICHARD F. ARMKNECHT, III
Counsel of Record
ARMKNECHT & COWDELL, P.C.
364 West 120 South
Lindon, Utah 84042
(801) 796-0901
Attorneys for Respondent, Disabled Rights Action Committee

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Court of Appeals erred in recognizing that the dignitary harm conveyed by the "mere" observation of overtly discriminatory conditions is sufficient to constitute the distinct and palpable injury that is required to satisfy the case or controversy limitation provided under Article III of the United States Constitution.

CORPORATE DISCLOSURE STATEMENT

Respondent is the Disabled Rights Action Committee, a Utah nonprofit corporation having members residing in Las Vegas, Nevada. Respondent is a member-based organization, and has no stock nor any corporate affiliations. The Disabled Rights Action Committee was one of the plaintiffs in the District Court, and the appellant in the Ninth Circuit Court of Appeals.

BRIEF IN OPPOSITION

Respondent, Disabled Rights Action Committee ("DRAC") hereby opposes the Petition for a Writ of Certiorari which was timely filed by Petitioner, Pacific Properties and Development Corporation (Pacific Properties) and docketed by this Court on July 2, 2004.

REASONS FOR DENYING REVIEW

I. THE QUESTION PRESENTED WAS NOT ADDRESSED BY THE NINTH CIRCUIT.

In the decision below, the Ninth Circuit was presented with a matter of statutory construction. In *Smith v. Pacific Properties and Development Corp.*, 358 F.3d 1097, 1103-04 (9th Cir. 2004), the Ninth Circuit found that 42 U.S.C. § 3604(f)(2) provides the same broad standing ("tester standing") that was recognized by this Court with regard to 42 U.S.C. § 3604(d) (see *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982)) and by the Seventh Circuit with regard to 42 U.S.C. § 3604(b) (see *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1527 (7th Cir. 1990), *United States v. Balistrieri*, 981 F.2d 916, 929 (7th Cir. 1992)). The question presented by Pacific Properties does not, however, concern statutory construction. Instead, the question presented concerns the "sufficiency" of an injury for the purposes of Article III's requirement of an "injury in fact." Petition ("Pet.") at i-ii. The Ninth Circuit, however, never addressed the "sufficiency" of injuries conveyed by "mere observation" for the purpose of satisfying Article III.

"[I]t is a sound exercise of discretion for the Court to allow [other courts] to serve as laboratories in which the

issue receives further study before it is addressed by this Court." *McCray v. New York*, 461 U.S. 961, 963 (1983) (STEVENS, J., respecting denial of petitions for writs of certiorari). Thus, "in the absence of consideration of [a] matter by the Court of Appeals, [this Court will] not consider it." *Meyer v. Holley*, 537 U.S. 280, 291-92 (2003), citing *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970).

II. THE DECISION OF THE NINTH CIRCUIT WAS CORRECT AND CONSISTENT WITH THIS COURT'S DECISIONS.

Even if the question presented had been addressed by the Ninth Circuit, it is clear enough that this Court's decisions do not support the judicial limitation on congressional authority that Pacific Properties seeks to impose. Clearly, "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973). See also, *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526-27 (7th Cir. 1990) ("Congress can create new substantive rights, such as a right to be free from misrepresentations, and if that right is invaded, the holder of the right can sue without running afoul of Article III, even if he incurs no other injury (for example, the loss of a home-buying opportunity.")

Pacific Properties' argument is laden with the imaginary and the hypothetical. Pacific Properties asks the Court to "imagine" causes of action based upon non-existent statutes that could be similar to the broad standing provided by Congress under 42 U.S.C. § 3604(f)(2). Pet.

at 8. By discussing imaginary statutes, Pacific Properties assumes (without argument) that the broad standing accorded under 42 U.S.C. § 3604(f)(2) (and similarly-worded sections such as 42 U.S.C. § 3604(b) and 42 U.S.C. § 3604(d)) is nothing more than a judicial creation. Moreover, Pacific Properties' focus on hypothetical statutes (along with a hypothetical "parade of horribles" that would stem from Congress' unbridled dispensing of broad standing through legislation) is contrary to the same "case or controversy" limitation on judicial power that Pacific Properties contends the Ninth Circuit has overstepped. Pacific Properties' support for its contention that the "[m]ere observation of an act does not cause a constitutionally cognizable injury." (Pet. at 15) is limited to five cases which cases are each addressed, *infra*.

First, *Warth v. Seldin*, 422 U.S. 490 (1975) concerned alleged violations of 42 U.S.C. §§ 1981, 1982 and 1983 – not of any violation of the Fair Housing Act. *Id.* at 493. Where the Fair Housing Act is at issue, broader standing is applicable. See, e.g., *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907 (2d Cir. 1993) (affirming an award of "$2500 to each of the four individual plaintiffs to compensate them for the emotional distress they suffered as a result of *viewing* the defendants' ads." (Emphasis added)).

Second, Pacific Properties' contention (that injury occasioned by observation of discriminatory conditions is insufficient for standing under Article III) is plainly *contradicted* (rather than supported) by cases concerning citizen suits seeking the enforcement of environmental laws. Thus, this Court has:

> . . . held that environmental plaintiffs adequately allege injury in fact when they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 ("Of course, the desire to use or *observe* an animal species, *even for purely esthetic purposes*, is undeniably a cognizable injury for purposes of standing.").

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 183 (2000) (emphasis added).

Finally, Pacific Properties' citations to *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and to *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91 (1979) do not concern "tester standing" – they concern "neighborhood standing." As this Court has noted, however, the "concept of 'neighborhood' standing differs from that of 'tester' standing" because "the injury underlying 'tester' standing – the denial of the tester's own statutory right to truthful information – is a direct one." *Havens Realty Corp. v. Coleman,* 455 U.S. at 375.

As the Ninth Circuit noted, observing discriminatory conditions constitutes a direct injury to DRAC's members in the form of dignitary harm. Pacific Properties does not contend that such dignitary harm is not real. Indeed, any such contention would run afoul of *Curtis v. Loether*, 415 U.S. 189, 195 (1974), where this Court held that violations of the Fair Housing Act are in the nature of dignitary torts. Instead, Pacific Properties contends that the *means* by which someone becomes *aware* of discrimination is

determinative for the purpose of meeting the Article III minima of injury in fact. Thus, Pacific Properties seeks to distinguish *Havens*, where "testers" (persons having no interest in the housing at issue) were subjected to racial "steering" in violation of 42 U.S.C. § 3604(d)) from members of DRAC who act as testers for violations of 42 U.S.C. § 3604(f)(2). In order for its argument to have any weight, Pacific Properties must make a distinction between testers who are made aware of discrimination by verbal statements (as in *Havens*) and testers who are made aware of discrimination by visual observation (as with DRAC's members). Pacific Properties, however, has undermined any such distinction by noting that, where dignitary harm has been occasioned by "gaining knowledge" about a discriminatory condition, it logically does not "matter whether that knowledge was gained through direct observation or from other means." Pet. at 9-10.

CONCLUSION

For all of the foregoing reasons, Respondent Disabled Rights Action Committee respectfully requests that this Court deny Petitioner Pacific Properties and Development Corporation's Petition for a Writ of Certiorari.

Respectfully submitted,

RICHARD F. ARMKNECHT, III
Counsel of Record
ARMKNECHT & COWDELL, P.C.
364 West 120 South
Lindon, Utah 84042
(801) 796-0901
Attorneys for Respondent,
Disabled Rights Action Committee